DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 North Capitol Street, NE, Suite 9100
Washington, DC 20002

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS Petitioner, v. FARCO TOWING SERVICE Respondent	Case No.: CR-I-05-S100787

ORDER DENYING RECONSIDERATION

The Government has filed a motion seeking reconsideration of a Final Order I issued on July 18, 2006, which suspended the fines sought for two violations by the Government against Respondent Farco Towing. In that decision, I found that the Government had failed to establish a violation of 16 DCMR 408.1 for charging a rate for a public tow in excess of the maximum rate set by regulation.[1] I also found that the Government did not establish that Respondent violated 16 DCMR 408.3 by failing to request approval of extra charges from the Director of the Department of Consumer and Regulatory Affairs ("DCRA") within 72 hours. The Government

[1] At the opening of the hearing, the Government moved to amend the Notice of Infraction to charge a violation of 16 DCMR 408.1 for charging a rate for a public tow that exceeds the maximum rates set by regulation in lieu of the charge of violating 16 DCMR 409.3 for charging for services not provided. Respondent did not object to the amendment and the Government's motion to amend was granted.

sought a fine of $2,000 for the violation of 16 DCMR 409.3 and a fine of $1,000 for the violation of 16 DCMR 408.3 for a total of $3,000.

In its Motion for Reconsideration, the Government contends that I incorrectly interpreted the regulations that Respondent was charged with violating.[2] Before addressing the Government's specific contentions in the Government's Motion for Reconsideration, I will provide background on the findings of fact and conclusions of law in the decision the Government has requested that I reconsider.

I. Background

A. Findings of Fact

Respondent responded to the scene of a single car accident on November 8, 2005, as requested by the Metropolitan Police Department. The towing had been authorized as a public tow by the Department of Public Works as required for public tows. 16 DCMR 406.3.

The car involved in the accident was wedged at an angle between a telephone pole and a retaining wall. Because of the position of the vehicle, it could not be extricated using a flatbed truck alone. Respondent used both a flatbed truck and a wrecker with a boom at the scene and

[2] Although Respondent entered a plea of Admit with Explanation, Respondent's major contention at the hearing was that Respondent was in compliance with all public tow regulations because the extra charges were for services for which extra charges may be assessed and that Respondent notified the Director of DCRA about those extra charges within 72 hours as required. I found that the evidence established that Respondent was not in violation of the regulations as charged. Since the violations had not been established and Respondent would not be liable for the violations but for his plea of Admit with Explanation, I suspended the fines. *DOH v Barbara Ann's Child Development Center*, I-03-42075 at 7 (Final Order, April 12, 2004), 2004 D.C Off. Adj. Hear. LEXIS 17 (respondent pleaded admit with explanation, but fine was suspended because of uncontested proof that respondent had complete defense to alleged violation).

Respondent's personnel spent approximately forty-five (45) minutes working to extricate the vehicle. This work included use of the boom on the wrecker to winch or lift the vehicle. Respondent charged a total of $170 for these services. This amount consisted of $100 for standard towing, $20 for storage, and $50 for labor. PX 104

At the hearing, Respondent submitted a copy of a letter dated November 10, 2005, addressed to the Director of DCRA at 941 North Capitol Street, NE Suite 9500 and signed by Mr. Arthur Farhat, owner of Respondent Farco Towing, which states as follows:

> Please be advised that the below mentioned vehicle was tow[ed] on 11/08/05 and was charged an extra fifty dollars for winching this vehicle out of private property. The vehicle was between the house and light pole. …. If this meets your approval, please advise. If not said funds will be refunded. Respondent's Exhibit ("RX") 200

Mr. Farhat testified that he mailed and faxed the letter to the Director of DCRA on November 10, 2005. Although the Government questioned the authenticity of the document, based on the demeanor of the witness, I considered his testimony credible and found that Respondent had mailed and faxed the letter requesting approval of the extra charges.

However, I also credited the statements in affidavits of DCRA's Supervisory Investigator and Custodian of Records for the Director that they have no record or memory of receiving this document. [3] The obvious implication of these two findings is

[3] The affidavit of the custodian of records for correspondence sent to the Director of DCRA stated that her search of the computerized data base maintained to log correspondence sent to the Director of DCRA shows no record of any letter to the Director received from Arthur Farhat in 2005 or at any other time. The second affidavit was from DCRA's Supervisory Investigator, who is responsible for approving tow truck operator requests for extraordinary towing fees. He stated that he receives all letters sent to the Director of DCRA for such approval and that a diligent search of his files showed no letter from Arthur Fahrat.

that although Mr. Farhat sent the document, it may not have found its way to the appropriate people after it was received by DCRA.

B. Conclusions of Law

At the hearing, the Government's first contention was that Respondent violated 16 DCMR 408.1 by charging a rate for a public tow that exceeded the maximum rates set by regulation [4] Respondent charged a total of $170 for the services that were provided, consisting of $100 for standard towing, $20 for storage, and $50 for labor. PX 104 The Government disputed only the $50 labor charge and concedes that the remaining charges were appropriate and authorized by the public tow regulation.

In addition to the maximum rates set by regulation, a tow truck operator may collect extra charges pursuant to 14 DCMR 408.3 for:

> the use of cranes, winches, dollies, or other equipment or services to perform a public tow under extraordinary circumstances or for restoration and cleaning of an accident site.

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[4] 16 DCMR 408.1 provides in pertinent part::

> The maximum rates that may be charged for all public tows initiated within the District of Columbia, and for all other services, including vehicle storage charges, related to public tows shall be as follows:
>
> (b) For Standard Towing Services, which apply to any passenger vehicle or any other vehicle with a Gross Vehicle Weight of 8,000 pounds, or less:
>
> (1) $100.00 for Preparation, hoist, and tow to location within the District (Roll-back or wheel lift – use of dollies included);
>
> (2) $3.00 for Towing charge per mile for each mile beyond the District line (at owner's request); and
>
> (3) $20.00 for Storage, per 24-hour period, or part thereof.

Based on credible testimony presented by Respondent, and the lack of any contradictory evidence from the Government, I found that the tow in question required more time and equipment than is generally required because the car was wedged in at an angle between a pole and a retaining wall and had to be extricated using a winch before it could be towed. I consequently found that the $50 charge for labor was a permissible extra charge and that Respondent had not violated the maximum rates provided for in 16 DCMR 408.1.

The Government's second contention at the hearing was that Respondent failed to request approval of these extra charges by the Director of DCRA as required by 16 DCMR. 408.3. By mailing and faxing a request for extra charges, I found that Respondent fulfilled his obligation to comply with this regulation.[5] I therefore found that a violation had not been established even though record searches at DCRA do not reflect receipt of the request. I concluded that the fact that DCRA may not have been able to locate the document does not rebut the credible testimony provided by Respondent at the hearing that the documents were faxed and mailed. In addition, I noted that since the affidavits are hearsay, they were entitled to less weight than the direct testimony presented at the hearing. S*ee Compton v. District of Columbia Board of Psychology* 858 A. 2d 470 (2004) (although hearsay can constitute substantial evidence, the reliability of hearsay is diminished when it is contradicted by direct testimony.)

[5] To avoid disputes about whether a request for extra charges was sent to DCRA in the future it would be desirable to send such requests certified/return receipt and retain fax documentation to confirm the number to which the letter was sent.

II. Government's Motion for Reconsideration

In it motion for reconsideration, the Government first contends that under 16 DCMR 408.3, a Respondent must not only submit a written request to the Director for extra charges that are collected, but must receive approval of the charges to retain the extra charges.

The relevant regulation, 16 DCMR.408.3 provides:

> The holder of a Basic Business License for a Towing Business may collect extra charges on-site for the use of cranes, winches, dollies, or other equipment or services to perform a public tow under extraordinary circumstances or for the restoration or cleaning of an accident site. Within 72 hours after collecting extra charges, the towing business must submit documentary evidence of the extraordinary circumstances to the Director along with a written request for approval of the charges. The Director shall provide a written response within 14 calendar days of receipt of the request for approval. If the Director does not approve extra charges, the licensee of a towing business must provide a refund to the customer in the amount of the disapproved charges within 72 hours of receipt of the Director's notice of disapproval.

In this case, I have found that the Respondent submitted documentary evidence to the Director as required. However, the Director did not respond to that request. The Government's position is in effect a claim that if a towing business does not receive any communication from the Director within fourteen days, either approving or disapproving the charges, it is automatically obligated to provide a refund.

The wording of the regulation does not support that construction. It requires a towing business to provide a refund to the customer "in the amount of the disapproved charges <u>within 72 hours of receipt of the Director's notice of disapproval</u>." In this case, Respondent has not received any notice of disapproval from the Director. Since Respondent requested approval of the extra charges, and received no notice from the Director disapproving those charges, its obligation to provide a refund was not triggered and it was not in violation of the regulation.

The Government's second contention is that 14 DCMR 408.3 gives the function of approving extra towing charges solely to the Director of DCRA and that this administrative court, by finding that the $50 charge for labor was reasonable, substituted its judgment of reasonableness for that of the Director.

For imposing the $50 additional charge, Respondent was charged with violating 16 DCMR 408.1, which provides the maximum rates for public tows. [6] I found that the $50 charge was reasonable based on language in 16 DCMR 408.3 which states:

> The holder of a Basic Business License for a Towing Business may collect extra charges on-site for the use of cranes, winches, dollies, or other equipment or services to perform a public tow under extraordinary circumstances or for the restoration or cleaning of an accident site.

The Government's contention that this administrative court substituted its judgment on the reasonableness for that of the Director is rejected for several reasons. First, Respondent was charged with exceeding the maximum rates in 16 DCMR 408.1. A determination about whether Respondent was entitled to collect extra charges for performing services described in 14 DCMR 408.3 was necessary to determine whether Respondent exceeded the maximums permitted by 16

[6] 16 DCMR 408.1 provides in pertinent part::

> The maximum rates that may be charged for all public tows initiated within the District of Columbia, and for all other services, including vehicle storage charges, related to public tows shall be as follows:
>
> (b) For Standard Towing Services, which apply to any passenger vehicle or any other vehicle with a Gross Vehicle Weight of 8,000 pounds, or less:
>
> (1) $100.00 for Preparation, hoist, and tow to location within the District (Roll-back or wheel lift – use of dollies included);
>
> (2) $3.00 for Towing charge per mile for each mile beyond the District line (at owner's request); and
>
> (4) $20.00 for Storage, per 24-hour period, or part thereof.

DCMR 408.1. The Director never made a determination on the reasonableness of the charges because the Director never responded or disapproved those charges.

Secondly, even if the Director had made a determination that the charge was unreasonable, that determination would be subject to review. The Government issued a Notice of Infraction under the Civil Infractions Act seeking to impose a $2,000 fine for exceeding the maximum rates in 16 DCMR 408.1 by $50. Respondent contested the Notice of Infraction, giving him the right to a hearing before an administrative law judge conducted in accordance with the District of Columbia Administrative Procedure Act, which requires a written decision containing findings of fact and conclusions of law supported by "reliable, probative and substantial evidence." D.C.Official Code § 2-509(e).

At the hearing, the Government has the burden of proving that Respondent exceeded the maximum rates by the preponderance of the evidence. § 2-1802.03. While the Director may have broad discretion in determining the reasonableness of extra charges, the Government must establish that the exercise of that discretion was not arbitrary, capricious or an abuse of discretion. That was not established in this case.

IV. Order

Therefore, it is this 22nd day of May, 2007:

ORDERED, that the Government's Motion for Reconsideration is **DENIED;** and it is further

ORDERED, that the appeal rights of any person aggrieved by this Order are stated below.

May 22, 2007

____/s/_____
Mary Masulla
Administrative Law Judge